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No. 84-1508

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HARVIS CONSTRUCTION, INC.,
SEABOARD SURETY COMPANY,
and THE HOME INSURANCE COMPANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
For the Use and Benefit of
Martin Steel Constructors, Inc.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 1985

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Martin Steel Constructors, Inc., (hereinafter "Martin") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case. The decision is reported at 750 F.2d 759.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Have Harvis Construction, Inc., Seaboard Surety Company, and The Home Insurance Company (hereafter "Harvis") waived the right to challenge the District Court's dismissal of Harvis' counterclaim by failing to appeal said dismissal, or to urge said dismissal as error, before the Ninth Circuit?

2. Even if the dismissal of Harvis' counterclaim can be challenged, for the first time, on petition for writ of certiorari, did the District Court err in dismissing Harvis' counterclaim?
3. Did the evidence proffered by Harvis in opposition to Martin's Motion for Summary Judgment raise a genuine issue of material fact regarding Martin's entitlement to judgment?

COUNTERSTATEMENT OF THE CASE

The Statement of the Case contained in Harvis' petition grossly mischaracterizes the procedural posture of the case at the time Judge Frye granted Martin's Motion for Summary Judgment by omitting any reference to the prior dismissal of Harvis' counterclaim against Martin for failure to state a claim upon which relief could be granted—a ruling that Harvis did not challenge in the Ninth Circuit. The procedural history behind the dismissal of Harvis' counterclaim is of critical importance to the merit of Harvis' petition.

Martin filed a Motion for Judgment on the Pleadings (CR 22) against Harvis on Harvis' counterclaim which was heard on January 16, 1981 before District Judge Jesse W. Curtis. Martin argued that Harvis' counterclaim merely alleged that Martin breached its supply contract with Avanti Constructors, Inc. (hereafter "Avanti"), who was in bankruptcy, but the counterclaim did not allege any facts that would state a claim on behalf of Harvis against Martin. Harvis' opposition papers relied exclusively upon federal law, erroneously arguing that Harvis' counterclaim was permitted by the Miller Act itself. (CR 23). At the hearing, Judge Curtis queried Harvis' counsel regarding the legal theory upon which Harvis' counterclaim was based, stating, "I'm anxious to see what theories these pleadings will sustain." (Transcript of hearing of January 16, 1981, page 6). Harvis' counsel responded by stating that, "this Counterclaim was set up as a setoff or offset to the claim that is being brought . . ." (Transcript of hearing of January 16, 1981, page 7). He failed, however, to mention any legal theory to support Harvis' entitlement to this alleged right of setoff.

After taking the matter under advisement, Judge Curtis issued a Memorandum (CR 25) which was filed on January 30, 1981. In his Memorandum, Judge Curtis invoked the doctrine of "equitable setoff," which had not been briefed, and held that, while Harvis' counterclaim was not cognizable at law, that it should "be deemed reformed so as to state a cause of action for setoff." (CR 25 at p. 4). On that basis, Judge Curtis denied Martin's motion.

On March 2, 1981, Martin filed a Motion for Reconsideration (CR 26) which, after further briefing (CR 27, 28), was granted pursuant to Judge Curtis' Memorandum and Order filed April 13, 1981. (CR 29). In this, his final ruling on the matter, Judge Curtis stated:

> While the general contractor might have some equitable claim to offset any damage resulting from Avanti's delays, which in turn were caused by Plaintiffs, such claim may not be enforced where no privity exists, since the Miller Act makes no provision for such action. As Professor Williston states:
>
> > The purpose of the Act is to protect those who furnish labor and materials for public works construction and to insure that they will be paid; the statute was not designed to protect general contractors.
>
> 10 *Williston on Contracts*, Section 1211A (3d ed. 1967).
>
> Particularly on point is *United States ex rel. Johnson v. Morley Construction Company*, 98 F.2d 781 (2nd Cir. 1938), *cert. denied*, 305 U.S. 651(1938), in which Judge Hand explicitly ruled that neither a prime contractor nor his surety could counterclaim against a non-privity supplier who sued on the performance bond by federal statute. *See also, United States use of A & W Concrete & Building Materials, Inc. v. Johnson Contractors, Inc.*, 225 F.Supp. 727 (E.D. La. 1964). (CR 29 at p. 3).

On June 4, 1981, Harvis filed a Notice of Appeal (CR 32) from Judge Curtis' ruling, which was dismissed for lack of jurisdiction since Martin's claim remained pending. (CR 40). Harvis then filed a Motion for Leave to File a First Amended

Counterclaim or, in the Alternative, to Revise Judgment of Dismissal to Include Leave to File Amended Counterclaim. (CR 44). This motion was heard and denied by Magistrate Thomas P. Young on January 14, 1982. (CR 47).

It was against the foregoing background that Martin's Motion for Summary Judgment was heard on May 21, 1982 before District Judge Helen J. Frye. Martin's motion was based upon the affidavit of its principal, Harold M. Martin, which averred that the materials called for in Martin's contract with Avanti were delivered to the job site as evidenced by bills of lading and receipts attached as exhibits to his affidavit.

Harvis opposed Martin's motion on the basis of the affidavit of Clark B. Morgan, Jr. (hereafter "Morgan") who averred that Martin had breached its contract with Avanti by:

(a) Delays in delivery of items to be embedded in concrete and major fabricated structural steel members.
(b) Improper marking and sorting of embedded parts and structural steel which required that these pieces be sorted in Hawaii.
(c) Inaccurate bills of lading.
(d) Items not galvanized, which required that they be galvanized and worked on in Hawaii.
(e) Misfabricated and bent parts and broken welds. (CR 49).

Morgan further averred that, as a result of the foregoing alleged breaches by Martin of its contract with Avanti, construction was delayed. Morgan did not, however, state that delivery of any of the materials was rejected, or that acceptance of any of the materials was revoked. Nor did he aver that any of the allegedly defective materials were replaced at the expense of Harvis as erroneously stated by Harvis on page 2 of the petition.

During argument before Judge Frye, counsel for Harvis admitted that the materials at issue were incorporated into the project:

> The pieces were incorporated, but not until much later, until the project had been delayed, other trades had been delayed, other subcontractors delayed.

Judge Frye then queried counsel further on this point:

> But, you didn't—your client didn't reject it when it was delivered late or when it was delivered without the proper pieces and so forth.

Counsel for Harvis responded:

> . . . as far as rejection, these were specially fabricated goods and as far as rejecting them, that would have further delayed the project and further subjected Harvis and Avanti to damages. (Transcript of hearing of May 21, 1982, pages 13-14).

Thus, Harvis did not contend below that any of the materials which Martin sought payment for on the basis of the affidavit of Harold M. Martin had been rejected. Harvis contended only that Martin's alleged breaches of contract delayed construction.

Judge Frye then, very astutely, inquired of Harvis' counsel:

> If I don't grant the motion for summary judgment, though, wouldn't it really be in conflict with the order of Judge Curtis which dismissed both the counterclaims? (Transcript of hearing of May 21, 1982, pages 22-23)

Counsel for Harvis apparently misunderstood Judge Frye's question, thinking she was referring to the ruling of District Judge Claiborne granting a motion for summary judgment made by Use-Plaintiff Inryco, Inc. in a related case, Civil No. 79-0348 in the United States District Court for the District of Hawaii. Counsel for Harvis then responded:

> That order is on appeal to the Ninth Circuit at this time, Your Honor, and we would expect—well, we're optimistic about the appeal. But, yes, Your Honor's decision would be in conflict, but for the fact that the actions of Martin Steel as far as noncompliance with their contract were much more egregious than those of [INRYCO] which is in the other case. (Transcript of hearing of May 21, 1982, page 23).

Judge Claiborne's ruling was indeed the subject of a Notice of Appeal[1] but, as already noted, Harvis' appeal from Judge Curtis' dismissal of Harvis' counterclaim, to which Judge Frye

[1] The case decided by Judge Clairborne was subsequently settled.

was directing her question, had already been dismissed as premature. In any event, Harvis' counsel offered no answer to Judge Frye's pointed question regarding whether Judge Curtis had, in effect, already ruled that Harvis had no claim against Martin for having allegedly delayed either Harvis' or Avanti's performance. Judge Frye accordingly granted Martin's motion for summary judgment. (CR 55).

On appeal to the Ninth Circuit, Harvis chose not to challenge either the propriety of Judge Curtis' dismissal of Harvis' counterclaim or Magistrate Young's denial of Harvis' motion for leave to file an amended counterclaim. Instead, Harvis took the position that Judge Frye erred in granting Martin's motion for summary judgment given the then existing state of the record. Harvis did not include Judge Curtis' April 13, 1981 Memorandum and Order, or any of the motions or memoranda pertaining to the dismissal of Harvis' counterclaim, in its Excerpt of Record as would have been required by Rule 13(a)(1) of the Rules of the United States Court of Appeals for the Ninth Circuit if Harvis had intended to place Judge Curtis' decision in issue on appeal[2].

When Martin then argued, in its Answering Brief, that Harvis had waived the right to contest the correctness of Judge Curtis' ruling, Harvis essentially *agreed*, arguing only that Judge Curtis' dismissal of Harvis' counterclaim did not dispose of Harvis' alleged right of set-off—not that Judge Curtis' ruling was incorrect. Appellant's Reply Brief, pp. 1-3. Accordingly, the Ninth Circuit did not consider the correctness of Judge Curtis' dismissal of Harvis counterclaim to be in issue, stating:

> Although Avanti's trustee in bankruptcy may have a contract action against Martin for alleged breach of their contract, the district court, Judge Curtis, ruled that Harvis does not have such a claim against Martin because there is no privity of contract between Harvis and Martin. *This was*

[2]Rule 13(a)(1) of the United States Court of Appeals for the Ninth Circuit is reprinted in Appendix B to this brief.

determined in the dismissal of Harvis' counterclaim, which is not on appeal in this action.

750 F.2d 759 at 762 (emphasis added).

The question decided by the Ninth Circuit, therefore, was the same question decided by Judge Frye, *viz.*, was Martin entitled to judgment as a matter of law on the then existing state of the record? Both Judge Frye and the Ninth Circuit answered this question in the affirmative—not based upon Louisiana law as alleged in Harvis' petition—but based upon Harvis' failure to raise a genuine issue of fact material to the elements of Martin's *prima facie* case.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Harvis Waived The Right to Challenge The Dismissal of Its Counterclaim By Failing to Appeal Said Dismissal Or To Urge Said Dismissal As Error Before the Ninth Circuit

The heart of Harvis' petition is Harvis' contention that it was erroneously deprived of the right to set its delay damages off against Martin's claim for the contract price of materials supplied to Harvis' subcontractor, Avanti. This issue was disposed of by Judge Curtis in his April 13, 1981 Memorandum and Order, which expressly ruled that Harvis lacked standing to assert damages arising out of Martin's alleged breaches of its contract with Avanti as either a "counterclaim" or as a "setoff" against Martin's claim[3].

As recounted in the foregoing Counterstatement of the Case, Harvis neither appealed Judge Curtis' ruling on this point, nor challenged its correctness before the Ninth Circuit. Instead, Harvis contended that Judge Curtis ruled on Harvis' counterclaim—but not on Harvis' alleged right to a "setoff." Since the Ninth Circuit correctly ruled that Judge Curtis' dispo-

[3]Harvis currently favors the appellation of "recoupment," which does not affect the underlying substantive issue of whether a claim is stated. The Hawaii cases cited for the "Doctrine of Recoupment" were first raised in Harvis' Petition for Rehearing to the Ninth Circuit, and do not address situations where privity is absent.

sition of this issue was "not on appeal in this action,"[4] Harvis has attempted to camouflage its own failure to appeal Judge Curtis' decision by implying to this Court, in its petition, that Judge Frye's order granting Martin's motion for summary judgment was the decision that disposed of Harvis' claimed right of setoff—which is not true.

As stated by this Court on numerous occasions, "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed." *Duiguan v. United States*, 274 U.S. 195, 200, 71 L.Ed 996, 47 S.Ct. 566 (1977); *California v. Taylor*, 353 U.S. 553, 1 L.Ed 2d 1034, 77 S.Ct. 1037 (1957).

In the case at bar, Judge Curtis dismissed Harvis' counterclaim on April 13, 1981—more than four years ago. In spite of two motions presented to Judge Curtis squarely addressing Harvis' right to assert delay damages in mitigation of Martin's Miller Act claim, Harvis never raised Hawaii Rev. Stat. §490:2-318 or any of the Hawaii case law cited in the petition. Harvis then failed to even cite to the Ninth Circuit, much less appeal, Judge Curtis' decision.

It would be inappropriate for this Court to now review the decision of the Ninth Circuit on the basis of arguments that were not presented to Judge Curtis, whose ruling, in turn, was not properly presented to the Ninth Circuit for review. Otherwise, Harvis will be rewarded for its neglectfulness and Martin may be forced to wait four more years for this case to be resolved through no fault on its part and with no prospect of recovering its attorneys' fees, even if Martin were again to prevail[5].

[4] 750 F.2d 759 at 762.

[5] Per this Court's decision in *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 40 L.Ed.2d 703, 94 S.Ct. 2157 (1974), Martin cannot recover attorney's fees under the Miller Act, even though Martin would have been entitled to recover attorney's fees from Avanti under state law.

2. Even if the Dismissal of Harvis' Counterclaim Can be Challenged, For the First Time, on Petition for Writ of Certiorari, The District Court Did Not Err in Dismissing Harvis' Counterclaim

a) Harvis Did Not Argue Before Judge Curtis That It Was Relying Upon §2-318 Or Any Other Hawaii Law

It its memorandum in opposition to Martin's motion to dismiss Harvis' counterclaim, Harvis relied on federal case law under the Miller Act to support its alleged cause of action. Harvis did not suggest that Hawaii law was applicable and made no reference to Hawaii Rev. Stat. §490:2-318. In his Memorandum of January 30, 1981, Judge Curtis found that the Miller Act did not itself provide a basis for Harvis' counterclaim, citing *U.S. ex rel Johnson v. Morley Construction Co.*, 98 F.2d 781 (2nd Cir. 1938) and *U.S. Use of A & W Concrete & Building Materials, Inc. v. Johnson Contractor, Inc.*, 225 F.Supp 727 (E.D. La. 1964). Since Harvis proffered no other legal basis for its counterclaim, it was correct for Judge Curtis to dismiss it.

Similarly, in Harvis' memorandum in opposition to Martin's motion for reconsideration, Harvis again failed to raise §2-318 or cite any other state law to provide a substantive basis for the counterclaim. Instead Harvis cited federal decisions to the effect that the counterclaim was jurisdictionally proper—a point never disputed by Martin.

b) Even if Harvis Had Raised §2-318 to Judge Curtis, §2-318 Does Not Afford Harvis A Substantive Basis For Its Counterclaim

As correctly stated by Harvis in the petition, Hawaii has adopted Alternative C of §2-318 of the Uniform Commercial Code. Comment number two to the official text states that the intended beneficiaries of the section are the buyer's family, household and guests. Comment number three goes on to point out that, beyond the "family household, and guests of the purchaser" the section is "neutral" and "not intended to enlarge or restrict developing case law on whether the seller's

warranties, given to his buyer who resells, extend to other persons in the distributive chain.''[6] There is no Hawaii case that extends a seller's warranty to buyers, such as Harvis, who are further down the distributive chain.

In its petition, Harvis incorrectly suggests that *Ontani v. Straub Clinic & Hospital*, 66 Haw. 237, 659 P.2d 734 (1983) completely eliminates privity as an element of an action for breach of warranty. Ontani was a personal injury plaintiff hurt by a defective footrest installed on one of Straub Hospital's X-ray tables. Ontani was clearly within the original intent of the statute as a ''guest'' of the purchaser ''injured'' by the seller's breach of its warranty to Straub Hospital. Harvis, on the other hand, was obviously not Avanti's ''guest'' and does not claim to have suffered any personal ''injury.''

Since §2-318 is thus ''neutral'' as to whether Harvis is an intended beneficiary of Martin's contract with Avanti, Harvis must look to Hawaii contract law, which follows the general rule that a general contractor is an incidental rather than intended beneficiary of its subcontractor's contracts. *Tropic Builders, Ltd. v. Naval Ammunition Depot Lualualei Quarters, Inc.*, 48 Haw. 306, 402 P.2d 440 (1965), *See also, Undersea Enqineering & Construction Co. v. International Telephone & Telegraph Corporation*, 429 F.2d 543 (9th Cir. 1970).

3. The Evidence Proferred by Harvis in Opposition to Martin's Motion For Summary Judgment Failed to Raise a Genuine Issue of Material Fact Regarding Martin's Entitlement to Judgment

The showing required in order to obtain summary judgment on a Miller Act claim is well-stated in *United States v. Continental Casualty Company*, 414 F.2d 431 (5th Cir. 1969). In affirming an award of summary judgment to a materialman supplying a subcontractor on a government project, the court stated:

> Several well established principles have emerged from Miller Act cases. It is fundamental that in order for a

[6]Comments 2 and 3 are reprinted in Appendix E to this brief.

> materialman to recover under the Act, it is necessary only that he show that [1] the materials were supplied in prosecution of the work provided for in the contract, [2] that he has not been paid therefore, [3] that in good faith he has reason to believe the materials were intended for the specified work, and [4] that he complied with the jurisdictional requisites.

Id. at 433.

Interestingly, Harvis has apparently abandoned the argument upon which Harvis primarily relied before the Ninth Circuit, *viz.*, that Martin failed to prove its *prima facie* case by establishing, beyond dispute, that its performance was absolutely flawless. Both Judge Frye and the Ninth Circuit correctly rejected the latter contention on the basis that acceptance of materials, without rejection or revocation of acceptance, makes the purchaser liable for the contract price. Hawaii Rev. Stat. §490:2-607. Neither Judge Frye nor the Ninth Circuit held that Harvis could not rely upon the defense that the materials had been rejected by Avanti—which clearly would be proper under Hawaii Rev. Stat. §490:2-602. However, as stated by the Ninth Circuit, "Avanti accepted the materials and they were undisputedly used in the project." 750 F.2d 759 at 761. Hence, absent a cognizable claim by Harvis against Martin for breach of warranty, Martin was entitled to judgment.

CONCLUSION

Harvis bemoans its fate before Judge Frye and the Ninth Circuit as constituting a deprivation of Harvis' day in court. Harvis could have protected itself against Avanti's insolvency, however, by demanding a performance bond or other guaranty of Avanti's performance. Even after Avanti's insolvency, Harvis could have filed a proof of claim with Avanti's trustee in bankruptcy, taken an assignment of Avanti's rights against Martin, or urged Avanti's trustee to pursue such rights, if any[7].

[7]Harvis volunteered to Judge Curtis that it chose not to file a claim with Avanti's trustee. (CR 27).

Having failed to take any of these available steps to protect itself, Harvis should not be heard to complain that it has been deprived of its day in court, especially when Harvis' petition is based on arguments not presented to the district judge and not preserved on appeal to the Ninth Circuit.

Accordingly, Martin respectfully requests that the petition be denied.

Respectfully submitted, this ____ day of _____ _____ , 1985.

_____

RICHARD R. CLIFTON
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Attorneys for Appellee

APPENDIX A

In the United States District Court
for the District of Hawaii

Civil No. 79-0159

United States of America, for the use and benefit of Martin Steel Constructors, Inc.,
Plaintiff,
vs.
Avanti Constructors, Inc., Harvis Construction, Inc., Seaboard Surety Company, and the Home Insurance Company,
Defendants.
[Filed April 13, 1983]

Memorandum and Order

These two actions were filed by use-plaintiffs Martin Steel Constructors and Inryco, Inc., pursuant to the Miller Act, 40 U.S.C. §270a. (1970), to recover payments due and owing them for materials supplied in connection with the United States Government construction contract. Defendants are Harvis Construction, Inc. (prime contractor), Avanti Construction, Inc. (sub-contractor), Seaboard Surety Company and Home Insurance Company (Harvis' bond sureties). Plaintiffs Martin and Inryco supplied materials to Avanti for use in its performance of the government construction contract which ran directly between the U. S. Government and Harvis. In the final analysis, neither of these claimants were paid for the material which they delivered to Harvis by way of the sub-contractor Avanti. Consequently, plaintiffs now sue the defendants in an effort to collect upon the performance bond which Harvis was obliged to secure.

In response to plaintiffs' suits, however, defendant Harvis and his two sureties have asserted a counterclaim against

the plaintiffs alleging that Harvis sustained damages caused by plaintiffs' delay in delivering certain materials to Avanti. Avanti is now insolvent.

Plaintiffs moved for judgment on the pleadings on the ground that, as a matter of law, without privity of contract between these parties, counterclaimants were barred from suing them for damages allegedly caused by a delay in delivering building materials to Avanti, the sub-contractor. This motion was denied by the court on January 20, 1981.

On March 2, 1981, plaintiffs, pursuant to Rules 7(b) and 60(b) of the Federal Rules of Civil Procedure, moved for reconsideration of the court's decision on the ground that it was erroneous.

In opposition to plaintiffs' motion, defendants first argue that the motion is untimely, since it is more appropriately a motion pursuant to Rule 59, which must be filed within ten days after the entry of judgment. But, the defendants are mistaken. This is simply a motion addressed to plenary powers of the court to reconsider an interlocutory order or ruling prior to judgment particularly authorized by Rule 60(b)(6). Under this Rule, plaintiffs' motion is clearly timely.

Upon reconsideration, it appears that this court's earlier order is erroneous and should be withdrawn. It is, of course, an elementary principle that privity is a necessary element of a cause of action on contracts. The Miller Act, however, expressly provides material men, suppliers and subcontractors with a direct cause of action on the performance bond of the general contractor providing they have a direct contractual relationship with a sub-contractor, and also comply with other various statutory requirements, even though privity does not exist. While the general contractor might have some equitable claim to offset any damage resulting from Avanti's delays, which in turn were caused by the plaintiffs, such claim may not be enforced where no privity exists, since the Miller Act makes no provision for such action. As Professor Williston states:

> The purpose of the Act is to protect those who furnish labor and materials for public works construction and to insure

that they will be paid; the statute was not designed to protect general contractors.

10 *Williston on Contracts*, section 1211A (3d ed. 1967).

Particularly in point is *United States ex rel. Johnson v. Morley Construction Company*, 98 F.2d 781 (2nd Cir. 1938), *cert. denied*, 305 U.S. 651 (1938), in which Judge Hand explicitly ruled that neither a prime contractor nor his surety could counterclaim against a non-privity supplier who sued on the performance bond by federal statute. *See also, United States use of A & W Concrete & Building Materials, Inc. v. Johnson Contractor, Inc.*, 225 F. Supp. 727 (E.D. La. 1964).

IT IS THEREFORE ORDERED that this court's order of January 29, 1981 be, and the same is hereby vacated and set aside, and plaintiffs' motion for judgment on the pleading as against the defendants Harvis Construction, Inc., Seaboard Surety Company and Home Insurance Company on their counterclaims be, and the same is hereby granted.

DATED: April 10, 1981

JESSE W. CURTIS
United States District Judge

APPENDIX B
RULE 13(a)(1) OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Briefs

(a) Required Excerpts of Record

(1) Appeals from District Court, Bankruptcy Court, and the Tax Court. At the time of the filing of appellant's brief, the appellant shall file five (5) copies of excerpts of the clerk's record to be bound separately from the briefs. The appellant shall serve one (1) copy of the excerpts on all other parties.

A. Documents from clerk's record. The excerpts shall include the following and no other documents from the clerk's record:

(i) the petition or complaint and answer and, in criminal cases, the indictment;

(ii) the pretrial order, if any;

(iii) the judgment or interlocutory order from which the appeal is taken;

(iv) other orders sought by be reviewed, if any;

(v) any supporting opinion, findings of fact or conclusions of law filed or delivered orally by the trial court (citations if opinion is published);

(vi) the motion and response upon which the court rendered judgment, if any;

(vii) the notice of appeal;

(viii) the parties' stipulation to a direct appeal to the U.S. Court of Appeals if the appeal is taken directly from a decision of the U.S. Bankruptcy Court, or the parties' written consent to trial before a U.S. Magistrate;

(ix) any certification by the district court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure or 28 U.S.C. §1292(b);

(x) any order of the district court under Rule 4 of the Federal Rules of Appellate Procedure extending the time for filing the notice of appeal; and

(xi) the trial court docket sheet.

Although not all the above-listed requirements are applicable to each case, each excerpt must contain at minimum items i, iii, vii, and xi. If the appellee believes that the excerpt filed by the appellant fails to include any of the required documents, exhibits, or pages of the reporter's transcript, the appellee may either file at the time its brief is filed a supplemental excerpt containing those documents, or may move for an order directing the appellant to supplement the excerpt with the necessary documents, exhibits, or pages of the reporter's transcript.

The trial court docket sheet shall always be the last document in the excerpt; it shall be placed after any parts of the reporter's transcript or exhibits included in the excerpt.

B. Reporter's transcript. When an appeal is based upon a challenge to the admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, a copy of the pages of the reporter's transcript at which the evidence, offer of proof, instruction, ruling, or order and any necessary objection are recorded must be included. It is intended that the number of pages reproduced from the reporter's transcript be strictly limited to those absolutely essential for review.

C. Exhibits. When a claim or defense is based on a written exhibit, the relevant parts of the exhibit shall be included in the excerpt.

APPENDIX C

Hawaii Rev. Stat. §490:2-602

Manner and effect of rightful rejection. (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (sections 490:2-603 and 490:2-604),

(a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of section 490:2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) The buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on seller's remedies in general (section 490:2-703). [L 1965, c 208, §2-602]

APPENDIX D

Hawaii Rev. Stat. §490:2-607

Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for nonconformity.

(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) He may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) If the claim is one for infringement or the like (subsection (3) of section 490:2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to

bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of section 490:2-312). [L 1965, c 208, §2-607]

APPENDIX E

Comments 2 and 3 to Hawaii Rev. Stat. §490:2-318

2. The purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to "privity." It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily upon the merchant-seller's warranty under this Article that the goods sold are merchantable and fit for the ordinary purposes for which such goods are used rather than the warranty of fitness for a particular purpose. Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

3. This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.